CHARLOTTE PECK ET AL.

IBLA 89-605 through 89-612 Decided September 26, 1990

Appeals from decisions of the Nevada State Office, Bureau of Land Management, denying requests for extension of time to make final proof for desert land entries and canceling the entries. N 30782, N 30784, N 30790 through N 30793, N 30795, and N 30796.

Affirmed.

1. Desert Land Entry: Extension of Time

An application for an extension of time for the submission of final proof of a desert land entry is properly rejected where the entryperson is unable to show that failure to reclaim the land in the entry within the statutory life of the entry is due, without fault on his or her part, to unavoidable delay in the construction of intended irrigation works. Even though the entrypersons believed they were constrained from proceeding with development of their entries due to BLM's advice that their entries may be affected by an injunction in a pending lawsuit, their requests for extension of the statutory final proof period must be denied where they have not demonstrated that they did "all they could do." Where the entrypersons assert that they could not proceed with construction of the intended irrigation works because they could not obtain financing, they have not demonstrated they did all they could do when they failed to respond to BLM's request to submit information regarding the financial institutions who denied them financing.

APPEARANCES: Charlotte Peck, Modesto, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Charlotte Peck, on behalf of Edwin Hargitt, Elaine Cripe, Earl Cripe, John E. Cripe, Carol A. Butterfield, Stephen R. Peck, Russell N. Peck, Jr., and herself, has appealed from decisions of the Nevada State Office, Bureau of Land Management (BLM), dated July 17, 1989, denying requests for extension of time in which to make final proof for their respective desert land entries, N 30782, N 30784, N 30790 through N 30793, N 30795, and N 30796. The appealed decisions also cancelled each of the subject desert land entries.

Applications for the subject desert land entries were filed with BLM on September 9, 1980. Each entry is for 320 acres and, jointly, they encompass the lands in secs. 21, 23, 33, and 35, T. 18 N., R. 45 E., Mount Diablo Meridian. From the start, the entrypersons informed BLM that these were independent entries with development to proceed through costs shared by the group, to be known as the Big Smoky Joint Venture Farm Group. See Letter to BLM dated September 3, 1980. When the affiliated lands were classified as suitable for desert land entries, entry was allowed for applications N 30790 through N 30793 on April 30, 1984. Entry on the remaining applications, N 30782, N 30784, N 30795, and N 30796, was allowed on December 12, 1984.

The plan for development shows that water was to be obtained from wells to be drilled on each entry. The plan involved joint cultivating, planting, and harvesting. The group, through executed powers of attorney, relied on Charlotte Peck (Peck) to handle all matters pertaining to these entries.

In March 1988, Peck filed individual requests for extension of time for a period of 3 years to make final proof on entries N 30790 through N 30793. Final proof on each entry was due on May 1, 1988. On January 13, 1989, Peck filed similar requests for entries N 30782, N 30784, N 30795, and N 30796, for which final proofs were due on December 13, 1988. 1/ In the requests, Peck asserted there had been an unavoidable delay in constructing the irrigation system. Peck referred to a BLM letter informing the entrypersons that, due to an injunction in a lawsuit against BLM, National Wildlife Federation v. Burford, the Government was restrained from transferring title to the subject land, and asserted the group was "unable to obtain finances as planned."

On January 17, 1989, BLM issued separate notices to each entryperson that the requests for extension of time would be denied unless additional information concerning financing was supplied. BLM advised each entryperson that an extension would be allowed "if your delay in constructing an irrigation system was unavoidable and without fault on your part." BLM instructed the group to "have each of the financial institutions you approached about [desert land entry] financing send us a statement as to when you contacted them and the reasons for their refusal to provide financing." A 90-day period was provided the entrypersons to furnish the requested information.

In a response received April 27, 1989, Peck asserted:

> Informal inquiries were sought by Earl Cripe. However once the BLM letter was issued indicating that title could not be conveyed it was self evident that no financial institution would provide financing. Please note the plan envisioned utilizing the crops in part to get the financing, and to do so the irrigation system needed to be installed. Once the BLM notice of the

1/ Peck's tardiness in requesting extensions in January 1989 did not bar the Department from considering the requests. See Anna R. Williams, 108 IBLA 88 (1989).

> lawsuit was sent this placed a cloud over this making it sufficiently difficult for anyone as a matter of law to get financing that no reasonable person would have proceeded until notice from BLM that such a limitation had been removed.

Peck requested a hearing on this matter to present evidence of an unavoidable delay. She also alleged that BLM did not act in a timely manner on the requests for extension.

On May 17, 1989, the subject entries were field examined. On all entries, well sites, or pads, averaging 70 feet by 90 feet, had been cleared and access roads to the pads, 12 feet wide, had been bladed. BLM reported that none of the wells had been drilled. In its respective decisions dated July 17, 1989, BLM denied the requests for extension of time because the requests lacked evidence to support such extension. BLM held that Peck's response to the January 27 requests for evidence was inadequate.

In the statement of reasons in support of the appeals from the July 17 decisions, Peck argues that "[i]t is self evident and reasonable that an entryman is not going to have the same ability to attempt to prove up on his or her claims when [BLM] has made clear that it does not have the ability to transfer title." Peck asserts that the time for final proof should have been extended or the time limitation tolled during the period when BLM could not transfer title. Peck also challenges BLM in its handling of the requests, stating that BLM failed to handle the requests in an expeditious manner, that the Battle Mountain, Nevada, District Office, BLM, indicated that the requests would be granted, and that BLM failed to permit the entrypersons the opportunity to appear prior to issuance of the decisions.

[1] The Desert Land Act provides both for entry of up to 320 acres of "desert land," or those lands "exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crops," upon a declaration by the entryperson that they intend to reclaim the land by conducting water thereon and for the patenting of the land to the entryperson upon the submission of satisfactory proof of reclamation within 4 years and suitable payment. 43 U.S.C. §§ 321, 322, 329 (1982). In order to be subject to entry under the desert-land law, public lands must be not only irrigable, but also surveyed, unreserved, unappropriated, and, subject to limited exception, nonmineral. 43 CFR 2520.0-8. Each application to enter public lands for a desert land entry must be accompanied by a petition to have the lands classified for disposition under the desert-land law if the lands have not already been so classified. 43 CFR 2400.0-3, 2521.2.

To test the sincerity and good faith of entrypersons, it is required that they expend yearly for 3 years from the date of entry not less than $1 per acre of the tract entered, making a total of not less than $3 per acre, in the necessary irrigation, reclamation, and cultivation of the land. 43 U.S.C. § 328 (1982); 43 CFR 2521.5. After the full sum of $3 per acre has been expended, and within 4 years of entry, the entryperson must make satisfactory proof of reclamation and cultivation, and, upon payment of $1 per acre, a patent will be issued. 43 U.S.C. § 329 (1982); 43 CFR 2521.6, 2523.2.

Final proofs were due for half the entries in question on May 1, 1988, and on December 13, 1988, for the remaining four. Peck requested extensions of time in which to submit them. An extension of time to submit the final proof is allowed by the Act of March 28, 1908, 43 U.S.C. § 333 (1982), which states:

> Any entryman * * * who shall show to the satisfaction of the Secretary of the Interior * * * that he has in good faith complied with the terms, requirements, and provisions of [desert land entry requirements], but that because of some unavoidable delay in the construction of the irrigating works intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said sections, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth facts, be allowed an additional period of not to exceed three years, within the discretion of the Secretary or such officer, within which to furnish proof * * *.

See also 43 CFR 2522.4. Further extensions, not more than three overall, are available in accordance with 43 U.S.C. §§ 334, 336 (1982). See Elaine S. Stickelman, 108 IBLA 392 (1989).

Peck suggests that time to submit final proofs should have been suspended in the instant cases. However, we find that this approach is without merit. Neither the statutes nor regulations provide for waiver or suspension of the time allowed to make final proof. Instead, Congress has provided that there be an extension of the proof period in the event an entryperson could not comply within the initial time allowed.

Peck also asserts that the proof period should have been extended. Under the statute, an extension not to exceed 3 years may be granted in the discretion of the authorized officer if, by reason of some unavoidable delay in the construction of the irrigating works intended to convey the water to the land, the entryperson is unable to make proof of the required reclamation and cultivation within the 4 years. 43 U.S.C. § 333. However, the Department has long held that such extension is not routinely granted and an unavoidable delay in the construction of the irrigating works is the only ground upon which an extension may be invoked. 43 CFR 2522.3; John S. Tendick, 37 L.D. 332 (1908).

The focus of this appeal is a BLM letter sent to each entryperson which, Peck asserts, made it impossible for the group to obtain financing for their wells. As a result of the failure to gain financing, Peck avers, the wells could not be built within the four-year proof period. Thus, the inference is that the failure to timely complete the irrigation works was unavoidable.

The BLM letter at issue reads in part:

> This is to notify you that your desert land entry * * * is involved in a lawsuit filed against the Department of the Interior

> by the National Wildlife Federation. While this lawsuit is in progress, you may continue to make your annual proofs as required by law. However, until the lawsuit is resolved, we cannot transfer title of the land to you.
>
> The lawsuit affects many withdrawals and classifications which closed lands to disposal under the agricultural land laws, including the Desert Land Act. On February 10, 1986, a court injunction * * * was issued that prohibited any action that was inconsistent with any withdrawal or classification that was in effect on January 1, 1981.

The preliminary injunction to which BLM refers arose from a suit before the United States District Court for the District of Columbia, brought by the National Wildlife Federation (NWF), challenging BLM's revocation of certain public land withdrawals. In granting NWF's motion for a preliminary injunction, the district court prohibited the Department from "modifying, terminating, or altering any withdrawal, classification or other designation governing protection of the lands in the public domain that was in effect on January 1, 1981, or taking any action inconsistent with such withdrawals, classifications or other designations." NWF v. Burford, 676 F. Supp. 280, 281 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987); see also NWF v. Burford, 676 F. Supp. 271 (D.D.C. 1985). 2/ Subsequently, in November 1988, the district court dismissed the suit for lack of standing. The preliminary injunction was vacated and NWF's motion for a permanent injunction was denied. NWF v. Burford, 699 F. Supp. 327 (D.D.C. 1988). Although the latter district court decision was reversed on appeal, 878 F.2d 422 (D.C. Cir. 1989), it was recently affirmed by the Supreme Court in Lujan v. NWF, 110 S. Ct. 3177 (1990).

Nevertheless, speculation over whether or not the injunction affected these lands is not relevant here. Rather, the issue before us is whether or not construction of the irrigation system was thwarted by factors beyond the group's control. In Pamela M. Brower, 26 IBLA 366 (1976), the entryperson appealed from a BLM decision rejecting a request for an extension of the proof period where a well for irrigation water had not been constructed because of a lack of financial resources. Affirming BLM, the Board commented:

> There have been numerous departmental decisions ruling that a claimant's failure to get a well drilled because he relied upon others or because his finances were inadequate, or because of other reasons where he should have been able to anticipate the delay or where he could have done more than he did, is insufficient to demonstrate a lack of fault upon the entryman and an unavoidable delay in the construction of the irrigation works.

2/ To provide notice to all persons dealing with public lands, the court's preliminary injunction was published at 51 FR 5809 (Feb. 18, 1986).

> See, e.g., Paul I. Kochis, [A-30427 (Oct. 26, 1965)], and cases cited. See also Calvin L. Howard, A-31060 (March 17, 1970).

26 IBLA at 372-73. The Board held that an application for an extension of time for the submission of final proof of a desert land entry was properly rejected where the entryperson was unable to show that the failure to reclaim the land within the statutory life of the entry was due, without fault on her part, to unavoidable delay in the construction of irrigation works. The Board concluded that she had failed to show she "made any effort to follow through and see that the work was done." Id. at 372.

In Paul I. Kochis, A-30427 (Oct. 26, 1965), the entryperson argued that "the failure to make final proof on the entry was no fault of his and was something he could not have readily foreseen." He asserted that the primary reason for failing to perfect the entry was his inability to find a well driller who would do the necessary work for him within the proof period. Based on the lack of actual, corroborated evidence that the entryperson could not find a driller to do the work, BLM's decision to deny an extension was affirmed, holding that the entryperson did not "otherwise show that he had done all that was possible for him to do to perfect the entry during the time he held it." Id.

Each application for an extension of time must, of course, be considered on its own merits and evaluated in light of all the circumstances shown. In this case, although Peck asserts that financing was made unavailable by BLM's letter to appellants notifying them of the NWF suit, she simply concludes that it is self-evident that financing would thereby be made unavailable. She also concludes that a reasonable person would not pursue development in light of BLM's statements. BLM, however, encouraged the entrypersons in the NWF letter to "continue to develop the land under the terms of your entry-allowed decision." The group did not follow those instructions.

The entrypersons, or their agent, therefore did not do all that was possible for them to do to perfect the entry. In the absence of facts showing their lack of fault in failing to diligently pursue the entry, we must conclude that BLM properly rejected their requests for extension of time to submit the final proof. BLM's decisions to cancel the respective entries must be affirmed.

We find no merit to Peck's claims that BLM unreasonably delayed decision in the matter of the extensions or that a hearing as requested was warranted. BLM is responsible for the management of millions of acres of public lands and must review numerous applications, lease offers, mining filings, and other documents associated with use or appropriation of those lands. It cannot always provide immediate attention to each request or petition received. In the instant case, review of the requests for extension occurred within a few months of receipt. As for the decisions denying the requests and cancelling the entries, BLM followed the procedures set forth in 43 CFR 2521.6(j)(1): "Where final proof is not made within the

period of 4 years, or within the period for which an extension of time has been granted, the claimant will be allowed 90 days in which to submit final proof." BLM, allowed the entrypersons 90 days to submit the specified evidence in support of their requests for extension. BLM issued the decisions shortly after Peck's response was received. We are unable to detect a breakdown in the review process whereby the entrypersons were prejudiced. Likewise, the opportunity to submit evidence provided by BLM was sufficient to satisfy the entrypersons' desire to be heard before the Department. A hearing at that level of review was therefore unnecessary.

Further, Peck's assertion that the group relied on a statement from BLM assuring them the extensions would be granted is not persuasive. While Peck attributes this statement to the Battle Mountain, District Office, BLM, there is no evidence of such a statement. Even if such a statement were made, it is well established that all persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. Magness Petroleum Corp., 113 IBLA 214 (1990). The statutory requirements for extending the proof period require that the entryperson "shall show to the satisfaction of [the authorized officer] * * * he is, without fault, unable to make proof." 43 U.S.C. § 333 (1982). Thus, until the extensions were granted in an official decision from the authorized officer, the entrypersons had no reason to assume extensions would be approved. If the group relied on erroneous or incomplete advice from a BLM employee, such reliance cannot create rights not authorized by law or relieve the group from the consequences imposed by the statute and regulations. Magness Petroleum Corp., supra at 217.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Franklin D. Arness
Administrative Judge

concur:

C. Randall Grant, Jr.
Administrative Judge